

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Order to Forfeit a Fine
against the Child Foster Care License of
Delmar and Manila Wiebe

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on January 5, 2010, at the Otter Tail County Government Center, 530 Fir Avenue West, Fergus Falls, MN 56537. The OAH record closed at the end of the hearing on January 5, 2010.

Nicole S.C. Hansen, Assistant Otter Tail County Attorney, Otter Tail County Courthouse, 121 West Junius, Suite 320, Fergus Falls, Minnesota 56537, appeared on behalf of the Department of Human Services ("Department"). Delmar and Manila Wiebe, the Licensees, appeared on their own behalf without legal counsel.

STATEMENT OF THE ISSUE

The issue is whether the Department of Human Services' order to forfeit a fine against Licensees' family daycare license should be affirmed because Licensees allegedly failed to seek a background study on an individual that would have unsupervised access to foster care children.

The Administrative Law Judge concludes that the Order to Forfeit a Fine be **RESCINDED**, because the Department failed to establish reasonable cause to believe that any statute or rule had been violated by the Licensees.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Delmar and Manila Wiebe have been licensed to provide child foster care in Otter Tail County since October 1962.¹ With the exception of the allegations at issue in this proceeding, there have been no licensing violations and no correction orders during the time of their licensure.²

¹ Testimony of Manila Wiebe and Carla Johnson-Rownd, Otter Tail County Child Foster Care Licensor and Social Worker; Exhibit 6.

² *Id.*

2. On August 22, 2009, Jordan Thorson, an 18-year-old male, returned to the Licensees' home directly from basic military training.³

3. During the time period relevant to this matter, August 22, 2009, through September 1, 2009, there were no foster children in Licensees' care.⁴

4. Licensees have a 39-year-old daughter, Kimberly McCash. At all relevant times prior to September 1, 2009, Ms. McCash lived in her own apartment in Perham, Minnesota. Ms. McCash has visited the Licensees in their home many times for family events and holidays and stayed overnight with knowledge and permission of the County.⁵

5. Ms. McCash has fetal alcohol syndrome and other unspecified disabilities. She also struggles with alcoholism. She has had driving while intoxicated convictions in the past. Except for a recent probation violation for driving without a driver's license, she has had no recent criminal violations.⁶

6. On August 26, 2009, Ms. McCash appeared in Otter Tail County District Court for the probation violation. Ms. Manila Wiebe appeared in court with her daughter. The District Court Judge ordered Ms. McCash to stay temporarily with the Licensees or have Ms. Wiebe stay with her until September 1, 2009, the date upon which Ms. McCash would enter Briarwood, an adult foster care treatment facility in Fergus Falls, Minnesota. The District Court Judge was aware that Ms. Wiebe was licensed to provide child foster care in her home.⁷

7. Ms. McCash slept overnight at Licensees' home on August 26, 2009.⁸

8. Ms. McCash has not been left alone and unsupervised with Jordan Thorson. Ms. McCash has not been allowed into the home when she was intoxicated.⁹

9. On August 27, 2009, a County social worker took a complaint from someone and prepared a Licensing Intake Complaint Form ("Form") based on what she was told by the reporter. The following is stated in the Form:

It is unknown what legal charges [Kimberly McCash] has had in the past or present.¹⁰

10. The Form also states that, "Kim has a home monitoring ankle bracelet." The foregoing statement was incorrect.¹¹

³ Test. of Jordan Thorson.

⁴ Test. of M. Wiebe; Exs. 1, 6.

⁵ Test. of M. Wiebe; Ex. 6.

⁶ *Id.*; Ex. 1.

⁷ Test. of M. Wiebe.

⁸ *Id.*; Exs. 1, 6.

⁹ Test. of J. Thorson and M. Wiebe.

¹⁰ Ex. 1.

¹¹ *Id.*; Test. of M. Wiebe.

11. On August 27, 2009, Ms. Wiebe received a telephone call from the County social worker that took the complaint, advising her that she was violating her license by allowing Ms. McCash to temporarily stay in her home without having a completed background check on Ms. McCash. Ms. Wiebe was told there had to be a background check completed on Ms. McCash before she could stay in the home.¹²

12. Also on August 27, 2009, after the telephone call from the County, Ms. Wiebe removed Ms. McCash from the home. Ms. Wiebe stayed with Ms. McCash in her apartment on August 27, 28, 29 and 30 as they arranged for storage of Ms. McCash's belongings. Ms. Wiebe and Ms. McCash stayed overnight in a motel in Perham, Minnesota, on August 31, 2009.¹³

13. On August 31, 2009, Ms. Wiebe telephoned the County licensor/social worker and advised her that Ms. McCash would be moving out of her apartment and moving to an adult foster care home on September 1, 2009. Ms. Wiebe also advised her that she would have Ms. McCash complete the background study forms and return them to her.¹⁴

14. On September 1, 2009, Ms. McCash entered Briarwood, the adult foster care treatment facility in Fergus Falls, Minnesota.¹⁵

15. On September 3, 2009, the County issued Licensees a Correction Order citing Minn. Stat. § 245C.03, alleging that the violation was, "Background study is required for anyone who may have unsupervised access to children from a program and has reasonable cause." The Correction Order specified a deadline of September 14, 2009, for returning the Correction Order.¹⁶

16. On September 5, 2009, Ms. Wiebe had Ms. McCash fingerprinted at the Fergus Falls jail, completed the background check forms and returned them and the signed Correction Order to the County on September 8, 2009.¹⁷

17. On October 1, 2009, the background check on Ms. McCash was completed. She is not disqualified from living in the home or having unsupervised access to foster care children.¹⁸

Procedural Findings

18. On September 3, 2009, Otter Tail County recommended in a letter report that the Department impose a \$200.00 fine on the Licensees.¹⁹ The County licensor/social worker preparing the report relied entirely on the Form prepared by

¹² *Id.*

¹³ Test. of M. Wiebe; Exs. 1, 6.

¹⁴ Ex. 3; Test. of C. Johnson-Rownd and M. Wiebe.

¹⁵ *Id.*

¹⁶ Test. of Manila Wiebe; Ex. 4.

¹⁷ *Id.*

¹⁸ Test. of C. Johnson-Rownd and M. Wiebe.

¹⁹ Ex. 3; Test. of C. Johnson-Rownd.

another social worker. She did not verify the allegations contained in the Form.²⁰ Also on September 3, 2009, the County advised Licensees by letter that negative action was being recommended to the Department.²¹

19. On October 23, 2009, the Department issued to Licensee its Order to Forfeit a Fine ("Order") in the amount of \$200.00.²²

20. On October 28, 2009, Licensees filed a timely appeal from the Order and requested an appeal hearing pursuant to Minn. Stat. § 245A.07.²³

21. On November 3, 2009, the Department executed a Notice of and Order for Hearing scheduling a contested case hearing on January 5, 2010.

22. On December 8, 2009, an Administrative Law Judge issued a Protective Order, which was served upon the parties by mail on that date.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules. Notice of any such action must be given by certified mail and must state the reasons for the sanction.

4. Under Minn. Stat. § 245A.08, subd. 3, the burden of proof first lies with the Commissioner, who may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden shifts to the license holder to demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules allegedly violated, at the time that the Commissioner alleges the violations occurred.

5. Minn. R. 2960.3010, subp. 21, defines "foster child" as a person under 18 years of age, a person in special education, or a juvenile under the jurisdiction of a juvenile court who is under 22 years of age and is placed in a foster home.

²⁰ Test. of C. Johnson-Rownd.

²¹ Exs. 2, 3.

²² Ex. 5.

²³ Ex. 6; Notice of and Order for Hearing.

6. The Department failed to advance reliable evidence sufficient to establish reasonable cause to believe that Jordan Thorson is either in special education or is under the jurisdiction of a juvenile court.

7. Minn. Stat. § 245C.03, subd. 1(a) in applicable part, requires that:

The Commissioner shall conduct a background study on:

. . .

(2) an individual age 13 and over living in the household where the licensed program will be provided;

. . .

(6) an individual who, without providing direct contact services at a licensed program, may have unsupervised access to children or vulnerable adults receiving services from a program, when the commissioner has reasonable cause;

8. “Reasonable cause” to initiate a background study is defined as:

[I]nformation or circumstances exist which provide the commissioner with articulable suspicion that further pertinent information may exist concerning a subject. The commissioner has reasonable cause when, but not limited to, the commissioner has received a report from the subject, the license holder, or a third party indicating that the subject has a history that would disqualify the individual or that may pose a risk to the health or safety of persons receiving services.

9. The Department failed to advance reliable evidence sufficient to establish reasonable cause to believe that Ms. McCash was living in the Licensee’s home.

10. The Department failed to advance reliable evidence sufficient to establish reasonable cause to believe that Ms. McCash might have unsupervised access to a foster child.

11. The Department failed to advance evidence sufficient to provide the commissioner with an articulable suspicion that further pertinent information may exist concerning Ms. McCash. The statement, “It is unknown what legal charges [Kimberly McCash] has had in the past or present” is insufficient to establish an adequate articulable suspicion that further pertinent information may exist concerning Ms. McCash.

12. The Department failed to advance reliable evidence sufficient to establish reasonable cause to indicate that Ms. McCash has a history that would disqualify her or that she may pose a risk to the health or safety of persons receiving services from Licensees.

13. The Department failed to advance reliable evidence sufficient to establish reasonable cause to believe that the Licensee violated Minn. Stat. § 245C.03, subd. 1(a).

14. Minn. Stat. § 245C.04, subd 1, regarding when background studies must occur provides in applicable part:

(f) . . . license holders . . . must submit completed background study forms to the commissioner before individuals specified in section 245C.03, subdivision 1, begin positions allowing direct contact in any licensed program.

15. The Department failed to advance reliable evidence establishing reasonable cause to believe that Licensees were required to have a background study completed on Ms. McCash under the requirements of Minn. Stat. § 245C.04, subd 1 (f).

16. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

17. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that the order to forfeit a fine be withdrawn and **RESCINDED**.

Dated: February 3, 2010

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with

the Commissioner.²⁴ Parties should contact the office of Cal Ludeman, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651)431-2907 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota law, the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

This matter requires three determinations. The first is whether or not there were any foster care children in Licensees' care during the time period in question. Second, whether Ms. McCash would have unsupervised contact with a foster care child. Third, whether there was "reasonable cause" to believe that a background check would be required on Ms. McCash.

Jordan Thorson

The Department appears to rely on an assumption that 18-year-old Jordan Thorson is a foster child. The definition of a foster child requires that the individual fit in one of three categories: a person under 18 years of age; a person in special education; or a juvenile under the jurisdiction of a juvenile court who is under 22 years of age. Mr. Thorson is 18 years old and therefore does not fit in the first category. There is no evidence in the hearing record to suggest that he is in special education. There was nothing in Mr. Thorson's demeanor or testimony that would suggest that he is or has been in special education. The Administrative Law Judge found him to be a straightforward, physically fit, if not somewhat shy young man. Finally, there is no evidence in the hearing record to either suggest or establish that Mr. Thorson is under the jurisdiction of a juvenile court. Without sufficient reliable evidence in the record, the Administrative Law Judge cannot conclude that Mr. Thorson is a foster child.

Even if Mr. Thorson were to fall into either of the latter two categories, the Licensees would still not be in violation of any rules or laws regarding background because Ms. McCash neither lived in the home nor would she have been left unsupervised with him, as discussed below.

Kimberly McCash

The reliable information in the record is insufficient to conclude that a background study on Ms. McCash was required. The record is clear that she did not live in the Licensee's home. There is no reliable evidence in the record to suggest that

²⁴ Minn. Stat. § 14.61.

Ms. McCash had been in the past or would be in the future allowed unsupervised, direct access to foster care children. Speculation is insufficient to establish this required element of Minn. Stat. § 245C.03, subd. 1(a).

The Administrative Law Judge may consider hearsay information if he finds that the information is the type of evidence on which reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs, and therefore reliable.²⁵ In this matter, the Department relied on hearsay information contained in the Form that the Administrative Law Judge concludes is unreliable. The Department relied on unverified, incorrect double hearsay information contained in the Form prepared by a County social worker who did not testify at the hearing. Material, incorrect information in that report included: a statement that Ms. McCash was in court for a driving while intoxicated offense; that Ms. McCash was being home monitored by an ankle bracelet; and that the complaint to the County and a telephone conversation with Ms. Wiebe occurred on August 28, 2009. This incorrect and unverified information was repeated and included in the September 3, 2009, recommendation letter, prepared by a different social worker, to the Department recommending the \$200.00 fine. The unreliable hearsay information in the Licensing Intake Complaint Form causes the remaining information in the Form to be suspect.

Credibility Determinations

The testimony of Ms. Wiebe and Mr. Thorson is given greater weight by the Administrative Law Judge than the Form and portions of other exhibits because it occurred under oath and was subject to cross-examination. Neither of those factors can be attributed to the Licensing Intake Complaint Form upon which the allegations in this matter are based. In addition, the Administrative Law Judge found Ms. Wiebe to be calm, deliberate, and a candid, sincere, and reliable witness.

Conclusion

A reasonable person having full knowledge of the actual facts of this case would not conclude that Licensees had someone living in their home or who otherwise may have unsupervised access to foster children, thereby requiring a background check. There is no reasonable basis to conclude that Licensees violated Minn. Stat. §§ 245C.03, subd. 1(a) or 245C.04, subd. 1 (f).

For all of these reasons, the Administrative Law Judge recommends that the order to forfeit a fine be rescinded.

M. K. S.

²⁵ Minn. R. 1400.7300, subp. 1.